IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	
FOSTER, JACK and	)	**Case No. 99-21593**
FOSTER, HEATHER,	)	
	)	
Debtors.	)	**MEMORANDUM OF DECISION**
	)	**AND ORDER**
	)	
_____	)	

HONORABLE TERRY L. MYERS, UNITED STATES BANKRUPTCY JUDGE

G. W. Haight, Coeur d'Alene, Idaho, for Debtors.

Gary L. McClendon, Staff Attorney, Office of the U.S. Trustee, Boise, Idaho.

Ford Elsaesser, chapter 7 Trustee, Sandpoint, Idaho.

The United States Trustee ("UST") has moved the Court for an order dismissing the chapter 7 bankruptcy of Jack and Heather Foster ("Debtors") pursuant to § 707(b) of the Code. This matter came before the Court for hearing pursuant to notice on June 13, 2000. The Court took the matter under advisement to complete its review of the arguments of the parties and the record. This decision constitutes the Court's findings and conclusions upon the contested matter. Fed.R. Bankr.P. 9014, 7052.

FACTS

The UST, chapter 7 Trustee, and Debtors made arguments at hearing premised upon the schedules and in particular the "budget" schedules, I and J.[1] No party presented evidence. The Court file, including the schedules, reflects the following.

Debtors filed their voluntary petition on December 28, 1999. They schedule secured claims of approximately $131,000.00 and unsecured claims of approximately $61,000.00. Those schedules clearly establish that their debts are primarily "consumer debts" and Debtors do not contend otherwise.

Schedule I reflects that Debtors are married and living together. At the time of filing, they alleged that a 19 year old daughter and 15 year old daughter were living with them. One Debtor is a school teacher in Post Falls. The other Debtor is employed as a "claims adjuster" for an insurance company and works in Spokane, Washington.

Schedule I reflects a total combined monthly income of $4,012.76. Debtors' original schedule J reflects total monthly expenses of $4,323.93. Debtors thus alleged a negative net monthly income.

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[1] The UST requested that the Court take "judicial notice" of the schedules. *See* Fed.R.Evid 201. *See also*, Russell, *Bankruptcy Evidence Manual*, §§ 201.5, 201.6, p.303-312 (2000 rev.ed.) (discussing limits on judicial notice of adjudicative facts through use of schedules; noting exception for debtor's evidentiary admissions therein). No party objected to the request; indeed all addressed items in the schedules. The UST's request is therefore granted.

On June 3, 2000, after the UST's motion was filed,[2] Debtors filed amended schedules I and J.[3] Amended schedule I deletes the reference to the 19 year old daughter as living with the Debtors. The Debtors' monthly income remains the same as set forth in the original schedule I. The expenses on amended schedule J decrease from $4,323.93 to $3,798.43. The amended budget reflects a net disposable income of $214.33 available on a monthly basis.

In order to address certain arguments advanced by the parties, the Court notes that amended schedules I and J allege:

- a payroll deduction of $356.00 per month from Mr. Foster's income for a "credit union car payment;"
- a payroll deduction from his monthly income of $193.44 for "retirement account;"
- monthly payroll deductions from both Debtors' income for "insurance" totaling $149.11, and also a separate expense item for health insurance of $104.00 per month;

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[2] Almost $600.00 of original schedule J expenses were characterized as "mortgage payments increase to catch up arrears." This, together with a food expense of $750.00 for four people, and an unexplained payroll deduction for a "credit union payment" triggered the UST's action. Motion, at 2.

[3] Debtors' attorney argued at hearing that the filing of the amended schedules I and J was in error. Despite that protestation, the amendments were signed by Mr. Foster. Simultaneously with the filing of these amended schedules, Debtors filed a "reply" to the UST's motion and appended to this pleading a photocopy of the same amended schedules I and J. The Court concludes the amendments are properly before it for consideration in connection with the UST's motion.

- $500.00 per month allocated for food for Debtors and one dependent, a reduction from $750.00 on the original budget;
- $100.00 per month budgeted for medical expenses;
- $100.00 budgeted monthly for "recreation, entertainment, newspapers, magazines, etc.;"
- $250.00 per month for "transportation (not including car payments)" and an additional $250.00 per month for "auto;"
- $120.00 per month for dental crowns;
- $152.00 per month denominated "Runge Furniture;"
- $100.00 per month for "attorney fees;"
- $75.00 per month for "Sears."

The amended budget also asserted that the mortgage default cure would be completed by June 2000, and that Debtors purchased a car post-petition to replace a leased vehicle which had been surrendered.[4]

DISCUSSION

Section 707(b) provides:

> (b) After notice and hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a

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[4] The original budget had an auto expense of $341.15, which was apparently the leased vehicle, and this was replaced with the $250.00 "auto" expense on amended schedule J. Debtors' second vehicle is paid for through the payroll deduction noted.

> presumption in favor of granting the relief requested by the debtor. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

In order to prevail on its motion, the UST must show that Debtors are individuals, their debts are primarily consumer debts, and that granting relief to the Debtors would be a "substantial abuse" of chapter 7. *In re Smith*, 95 I.B.C.R. 62 (Bankr. D. Idaho 1995); *In re Williams*, 155 B.R. 773, 774, 93 I.B.C.R. 176 (Bankr. D. Idaho 1993). As noted above, there is no question that these Debtors are individuals and their debts are primarily consumer debts as defined in § 101(8) of the Code.

Both *Williams* and *Smith* recognize that in the Ninth Circuit the primary factor to be considered in determining whether or not granting relief would constitute a "substantial abuse" is the debtor's ability to pay his debts. *Williams* 155 B.R. at 774, *Smith* 95 I.B.C.R. at 62, both citing *Zolg v. Kelly (In re Kelly)* 841 F.2d 908 (9th Cir. 1988). *See also, In re Mills,* 246 B.R. 395 (Bankr. S.D. Calif. 2000); *In re Gomes*, 220 B.R. 84 (9th Cir. BAP 1998); *In re Motaharnia,* 215 B.R. 63 (Bankr. C.D. Calif. 1997); *In re Morse*, 164 B.R. 651 (Bankr. E.D. Washington 1994).

It would unduly lengthen this opinion to set forth the analyses of these courts in detail. It is sufficient to note that they acknowledge that in this Circuit the debtor's "ability to pay" is the primary factor. *See, e.g., Mills*, 246 B.R. at 400-01. The cases also universally recognize that § 707(b) provides a presumption in favor of granting the relief requested by the debtor. *See, e.g., Mills*, 246 B.R. at 400. "This means that

'the Court should give the benefit of any doubt to the debtor and dismiss a case only when a substantial abuse is clearly present.'" *Id.*, quoting *Kelly*, 841 F.2d at 917.[5]

The presumption in favor of the relief requested by the debtor requires that the movant come forward with evidence of sufficient weight and degree to rebut the presumption, at which point the presumption vanishes and the question becomes simply one of fact. *See, In re Snow*, 185 B.R. 397, 402-03 (Bankr. D. Mass. 1995) citing Russell, *Bankruptcy Evidence Manual*, §§ 301.3, 301.7 (1994-95 rev.ed.). The movant might meet this burden "if the schedules indicate a debtor's ability to make very substantial payments on unsecured indebtedness." 185 B.R. at 403. *See also, In re Cohen*, 246 B.R. 658, 664-65 (Bankr. D. Colo. 2000); *In re Haffner*, 198 B.R. 646, 649 (Bankr. D. R.I. 1996).

Thus, schedules filed by debtors under penalty of perjury can be considered by the Court and given evidentiary weight. In some cases, schedules standing alone may be sufficient to rebut the § 707(b) presumption. Since no evidence was

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[5] In reaching its conclusion, the Court in *Kelly* noted the legislative history of § 707(b):

> Indeed, the committee report on the final version of S. 445 states clearly that dismissal for substantial abuse is intended to "uphold [ ] creditors' interests in obtaining repayments where such repayment would not be a burden," and that "if a debtor can meet his debts without difficulty as they come due, use of chapter 7 would represent a substantial abuse."

841 F.2d at 914, citing S. Rep. No. 65, 98th Cong., 1st Sess. 53, 54 (1983) (footnote omitted).

presented at hearing, the Court must evaluate the schedules here to see if, through them, the UST has met its burden.[6]

Amended schedules I and J concede Debtors have an ability to pay $214.33 per month. Over a three-year plan, this would generate some $7,700.00 or enough to satisfy between 10 and 15% of the scheduled unsecured debt. This amount of potential debt service is lower by a substantial degree than those amounts that courts have found to reflect an "ability to pay" for purposes of § 707(b).[7]

The UST argues that Debtors' disclosed net income is not controlling and that they have more available with which to pay. For example, the UST urges that Debtors should not be allowed, without explanation, to separately pay a monthly health insurance expense when insurance (presumptively health insurance) is covered through payroll deduction. However, without evidence on the subject beyond the mere schedules, the Court has no way of evaluating the merits of the UST's contention. Raising a suspicion is not the same as proving impropriety.

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[6] The decision to forgo presentation of evidence has a clear impact on the party which carries the initial burden. However, debtors are similarly at risk should they elect to stand on the schedules but the Court determine that those schedules adequately rebut the presumption. In such a situation, the presumption disappears and the debtors regain the burden of persuasion. *Cohen,* 246 B.R. at 665; *Haffner*, 198 B.R. at 649; *see also* Russell, *Bankruptcy Evidence Manual* at § 301.7, p.350 (2000 rev. ed.), citing *In re Smith*, 229 B.R. 895 (Bankr. S.D. Ga. 1997).

[7] Percentages are a somewhat inexact way of evaluating ability to pay. *See, e.g., In re Coleman*, 231 B.R. 760 (Bankr. D. Neb. 1999). And Congress established no threshold percentage for determining ability to pay. *Gomes*, 220 B.R. at 88. However, decisions based on or referring to such percentages are legion. *See,* e.g., *Kelly*, (debtors could service 99%); *Gomes*, (43%); *Mills*, (ability to pay 65%); *Morse*, (apparently 55%). But see, *In re Martin*, 107 B.R. 247 (Bankr. D. Alaska 1989) (50% repayment ability not sufficient to amount to substantial abuse given other factors).

The Court has similar difficulties in considering the UST's arguments that the adjusted food budget of $500.00 or "recreational" expenses of $100.00 are too high. In the literally hundreds of cases the Court has reviewed, many debtors' schedules J contain figures in these ranges; whether they are reasonable and appropriate for these Debtors requires more factual development than took place here.

The transportation expense of $250.00 per month exclusive of car payments does seem high in relation to the amounts shown in the majority of cases the Court has had cause to review, but that doesn't enable the Court to reject it out of hand. Whether this amount reflects something more than actual job commuting expenses, as represented by Debtors' counsel, cannot be determined on this record.

The retirement contribution of Mr. Foster might be a matter of concern, in an "ability to pay" context, to the extent that it is a voluntary employee contribution rather than a required contribution. *See, e.g., Mills*, 246 B.R. at 401-03; *In re Davis*, 241 B.R. 701, 706 (Bankr. D. Mont. 1999); *In re Cavanaugh*, 175 B.R. 369, 373, 94 I.B.C.R. 219, 221 (Bankr. D. Idaho 1994). The Court, however, has been provided no basis upon which to conclude that this is other than a mandatory contribution.

The budget reflects an expense for deferred dental work. This is not per se unreasonable, and further factual development is required if it is to be disregarded in analyzing Debtors' ability to pay.

Debtors' amended budget also reflects monthly post-petition payments to two creditors, Sears and Runge Furniture. While the file doesn't reflect any reaffirmation agreements or redemptions with these parties, it is not unreasonable for a debtor to

project the post-petition cost of retaining secured chattels. Debtors' schedule D reflects an obligation to Runge Finance of $900.00 of which $750.00 is allegedly secured, and an obligation to Sears of $7,736.37 of which $550.00 is alleged to be secured by a computer and a treadmill. If these obligations are serviced through reaffirmation, the budgeted payments will continue for a least some period of time.

However, the amended budget also sets aside $100.00 per month for post-petition legal fees, which counsel represents are anticipated in litigation with Sears. The file doesn't reflect that this litigation has commenced, nor is there evidence of the need for litigation, its likely benefit, or its likely cost. This budget item, therefore, deserves little weight in the analysis, and would indicate that Debtors could have an additional $100.00 available on a monthly basis.

Debtors also assert, in argument, that Mr. Foster will incur between $900.00 and $1,350.00 in continuing education expenses between now and next September. This is represented to be an expense necessary for additional education in order to allow him to "progress within his teaching field." Reply to Motion, at 2. It is not alleged that these expenses are necessary for him to retain certification as a teacher or ensure his employment. These amounts would therefore not be treated as necessary expenses for purposes of the Court's analysis. However, while Debtors make arguments regarding these expenses in an attempt to decrease their prospective ability to pay creditors, they are not reflected in the amended schedule J. Thus, the Court's exclusion of them does not impact the calculation of net available monthly income.

In sum, after evaluating the various contentions of the parties, the Court has concluded that there is some unsubstantiated expense in regard to the legal fees and continuing education costs. The practical effect, given the fact that continuing education expenses were never scheduled in the first place, is to elevate the net monthly or available "disposable" income to $314.33. This results in $11,315.88 being available over the course of thirty-six months, resulting roughly in a 19% distribution on scheduled unsecured debt.[8] It is clear that the amount available for distribution would further increase should any of the suspicions of the UST prove founded. But that proof is not before the Court.

While there is evidently "some" ability to pay creditors, and debtors have certainly funded chapter 13 plans in this District on less than that available here, the statutory presumption requires that the "benefit of any doubt" be given Debtors in determining whether granting them relief under chapter 7 would be a "substantial abuse." *Kelly*, 841 F.2d at 917. No special allegation of substantial abuse has been

[8] The Trustee argued that the Court should evaluate a "likely" chapter 13 plan, which could include a longer cure of default to mortgage lenders than what Debtors structured, cramdown of debt on vehicles, and perhaps a higher distributive percentage to unsecured creditors depending upon the number of creditors which actually file claims. This approach, however, requires conjecture and supposition beyond what the present record will allow.

leveled against these Debtors, and the matter is presented solely on the "ability to pay" issue.[9]

There are clearly, in this case, some unanswered questions regarding ability to pay. But the law requires proof, not supposition. The burden under § 707(b) is upon the objecting party. The schedules alone are before the Court by way of evidence, and they are insufficient to rebut the statutory presumption.

CONCLUSION AND ORDER

The Court concludes that the ability to pay established on this record does not rise to the level previously recognized by the courts as constituting substantial abuse under § 707(b). The motion of the UST is therefore DENIED.

Dated this 29th day of June, 2000.

[9] *Mills*, 246 B.R. at 403-04 discusses several other "factors" which might be considered in addition to the "principal" factor of ability to pay. No such issues were raised by the parties in this case.